

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTHSTATE, LLC

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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Case No.: _____

18-34

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FILED

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U.S. COURT OF
FEDERAL CLAIMS

COMPLAINT

NOW INTO COURT COMES Plaintiff, HEALTHSTATE, LLC (“HeS” or “Plaintiff”), who files this complaint for infringement of the commercial software owned by HeS, named both “HEALTHSTATE” and “Remote Online Veterinary Record (“ROVR”),” by the Defense Health Agency (“DHA”), the Department of Veterans Affairs (“VA”), and those acting with authorization and consent of the government, namely ASM Research, Inc. (“ASMR”) and their successor in interest, Accenture Federal Services, LLC (“Accenture”), among others, thus entitling HeS to reasonable and entire compensation, including costs and attorneys’ fees for this action, and in support thereof, shows as follows:

PARTIES

(1) Plaintiff, HEALTHSTATE, LLC, is a Delaware Corporation, having an office at 4100 Monument Corner Drive, Suite 450, Fairfax, Virginia 22030.

(2) Defendant is the United States government, including the Defense Health Agency and Department of Veterans Affairs and any federal instrumentality, or other entity with government authorization and consent, that may be using, licensing, or otherwise exercising

dominion and control over HeS or ROVR in any way, all of whom may be served through the Intellectual Property Staff, Commercial Litigation Branch, Civil Division U.S. Department of Justice, Washington, DC 20530, Tel.: (202) 514-7223, Fax: (202) 307-0345.

JURISDICTION AND VENUE

(3) This Court has venue and jurisdiction to award just compensation for this takings claim pursuant to the Fifth Amendment to the United States Constitution and 28 U.S.C. § 1498(b).

FACTUAL ALLEGATIONS

(4) HeS's core product is an electronic health record ("EHR") developed originally by the government, then privatized and developed as a commercial off-the-shelf software product by HeS (Enclosure 1). A history of the product can be found on the HeS website (www.healtheforces.com). HeS modified its software source code to produce ROVR. ROVR allows veterinarians to keep electronic and online records of their treatment of animals rather than human patients (Enclosure 2).

(5) HeS is the sole authorized owner and copyright holder of the ROVR software and any underlying source code, a fact the government has always known (Enclosure 2).

(6) On September 28, 2012, HeS entered into a subcontract agreement with ASMR to enhance HeS's baseline software product in support of the Veterinary Services Systems Management Program under Prime Government Contract No. FA8053-12-D-0007 with DHA (Enclosure 3). The prime contract was not provided to HeS. Pursuant to the subcontract, "[t]he source code was not to be used for any other purpose," remained the property of HeS, and ASMR was granted no license, except that necessary to perform the subcontract.

(7) In September 2013, Accenture acquired ASMR. On December 19, 2013, ASMR

and HeS entered into Modification No. 1 to the subcontract (Enclosure 4). This modification extended the period of performance from September 20, 2013 to May 7, 2014. HeS granted ASMR only the right to use its software for enhancement purposes and for periods of time set forth in the subcontract. This modification also made clear that HeS retained ownership in the software; further indicia of this intent is that there was no payment to HeS for any ownership transfer of the valuable HEALTHeSTATE/ROVR software code.

(8) On April 5, 2013, ASMR teamed with HeS to compete for the “T4-0221 Innovation 745 - Modernized Progress Notes” (Enclosure 12).

(9) On March 30, 2014, Andy Baker, former CEO of HeS, was informed by ASMR that HeS’s source code was to be designated by ASMR as the DHA Core Program for use by all clinics within the Department of Defense, including the Defense Healthcare Management Systems Modernization procurement effort, or DHMSM (pronounced “dim sum”) (Enclosure 5). This has since occurred.

(10) ASMR transferred HeS’s ROVR software code to the government on May 27, 2014 labeled with “government purpose rights” (Enclosure 6). ASMR did not tell HeS it was doing this, and ASMR had no authority from HeS to effect such a transfer of the software code. Moreover, the subcontract, and any authority ASMR might have had, evaporated with the expiration of the subcontract on May 7, 2014 (Enclosure 4).

(11) On May 29, 2014, DHA published a FAR Part 6 Justification and Approval for a \$13,295.620.00 sole source contract to ASMR (“J&A”) (Enclosure 7). The stated purpose was for “continued maintenance and technical support” of ROVR. The government also specifically cited justification as “ASM Research has proprietary rights to the basic software source code. No other vendor can perform these tasks as they do not have access to the proprietary code.”

ASMR had no authority or consent from HeS to use its software code or perform this work. As further evidence of its lack of authority, ASMR breached the subcontract to perform this new work without HeS's assistance or consent (Enclosure 4, p. 2). In addition, the government, in response to a FOIA request by HeS (Enclosure 17), admitted wrongdoing by publishing a statement that investigative documents, lawfully-required prior to sole source awards, did not exist (Enclosure 18). Despite this, Contract Number DHA2014-SA01 was unlawfully awarded September 5, 2014 by DHA to ASMR.

(12) On or about July 2, 2014, the government awarded ASM Research a \$162 Million contract to modernize the VA's EHR (Enclosure 13). The government awarded an additional contract to ASMR on or about September 8, 2016, valued up to \$22.3 Billion (Enclosure 14).

(13) On October 1, 2014, and thereafter, HeS made a claim to the government disputing any contrary claims to its ownership of its EHR software (Enclosure 8 & Enclosure 16). HeS also complained to ASMR and Accenture, and they have asserted that they are using the source code with the full authorization and consent of the government.

(14) DHA responded on January 28, 2015, professing confusion and uncertainty as to who owns the HEALTHeSTATE/ROVR source code (Enclosure 9). Despite this uncertainty, the government proceeded with ROVR roll-out and its contracts with ASMR, Accenture, Cerner, and Leidos, with Accenture also using the HEALTHeSTATE/ROVR software code, all without any consent or authorization from HeS.

(15) On February 15, 2015, HeS sent verified answers to the questions posed by HeS, unequivocally claiming copyright infringement, refuting any contrary claims to its ownership of its EHR software, and demanding fair compensation to HeS from May 7, 2014 forward (Enclosure 10). HeS sent another letter to the Secretary of Defense reiterating its infringement

claim regarding its EHR software on March 26, 2015 (Enclosure 16).

(16) On or about July 29, 2015, DHA awarded the Defense Healthcare Management Systems Modernization procurement effort, or DHMSM, to Leidos, Accenture, and Cerner for a web-based electronic health records system (Enclosure 15). The contract's initial amount was \$4.33 Billion, but is estimated to exceed \$11 Billion.

(17) Undersigned counsel sent a follow-up letter to the government on behalf of HeS on December 11, 2017, requesting a final decision (Enclosure 11).

(18) To date, the government has not issued a final decision on the HeS infringement claims and is continuing to use the HEALTHeSTATE/ROVR source code software and authorize others to do the same, all without any compensation to HeS.

CAUSE OF ACTION

COPYRIGHT INFRINGEMENT

(19) Paragraphs 1-18 are incorporated as if fully set forth herein;

(20) HeS is the sole owner and copyright holder of HEALTHeSTATE/ROVR and its underlying software code, and the government has always known this;

(21) HeS did not provide anyone authority to transfer HEALTHeSTATE or ROVR ownership, or its underlying software code to the government on May 8, 2014 or thereafter, nor has HeS been paid for same; the government has been on notice of this since October 1, 2014, but has continued to act contrary to this advice, and has not yet formally denied HeS's claim;

(22) Because neither ASMR nor Accenture acquired any perpetual license from HeS for its software or underlying code, their continued use and any such conveyance to the government was unauthorized and invalid.

(23) The government has continued to use and benefit from HeS's

HEALTHeSTATE/ROVR software and underlying code, and has granted authorization and consent for others to use it, including, but not limited to, ASMR and Accenture; and

(24) HeS has received nothing from the government, or any other entity with authorization and consent from the government, to compensate it for the use and infringement of its HEALTHeSTATE/ROVR software and underlying code.

(25) WHEREFORE, the Plaintiff prays:

- (a) That their claim for copyright infringement be found meritorious and granted;
- (b) That they be granted reasonable and entire compensation for such infringement, including, but not limited to, reasonable royalties, costs, and attorneys' fees for this action;
- (c) For such other and further relief as this Court deems just.

Respectfully submitted this 5th day of January, 2018,

NEEL, HOOPER & BANES, P.C.

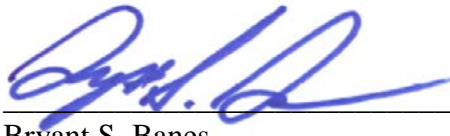


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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January, 2018, a copy of the foregoing was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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